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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 475

TEXACO INC., AMERADA PETROLEUM CORPORATION, GULF OIL CORPORATION, JAKE L. HAMON, HUMBLE OIL & REFINING COMPANY, SOHIO PETROLEUM COMPANY, EMORY M. SPENCER,
Petitioners,

v.

FEDERAL POWER COMMISSION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY AND SUPPLEMENTAL STATEMENT OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The motions to adduce evidence were filed in the Court below because it appeared to Petitioners that such action was required under Section 19 of the Natural Gas Act and Court decisions interpreting similar statutes. Since the filing of the Petition for Writ of Certiorari here, the majority judges below have written an opinion, and we now have the response in opposition to the petition filed by the Solicitor General on behalf of the Respondent, Federal Power Commission. These statements merely underline the need for a statement from this Court, however brief, which will remove the confusion which now surrounds this significant statutory language[1] — significant in that failure to under-

[1] The opinion below is printed in the Brief in Opposition (herein referred to as "Brief") at pages 13-29. As noted in the majority opinion, language similar to that of Section 19 (b) of the Natural Gas Act appears in some twenty-five other statutes.

stand and follow it can result in the waiver of fundamental rights to judicial review of agency actions.

In the brief in opposition we are told that this Court's decision in *Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S. 197 (1938), and the plain language of the statute merely mean "that exclusionary rulings *must be* attacked by a motion to adduce rather than by an assignment of error". (Brief, p. 10)[2] However, the very cases cited by the majority below in their discussion of the powers flowing under Section 19(b) of the Natural Gas Act are situations where the matters were remanded although the cases arose on petitions to review and *not* as a result of motions to adduce. (Brief, p. 21, reference to *International Brotherhood of Operative Potters v. National Labor Relations Board*, 320 F. 2d 757 (C.A.D.C. 1963), and *Wheeler v. National Labor Relations Board*, 314 F. 2d 260 (C.A.D.C. 1963)). Thus, the lack of clarity still surrounding these matters is well illustrated.

We are also told that the statute is clear ". . . and assumes the existence of a pre-existing final order of the Commission . . . What it authorizes is not an appeal from an interlocutory order of the Commission . . ." (Brief, p. 8).

But after reading and construing the statutes:

(a) The majority in *Communist Party of the United States v. Subversive Activities Control Board*, 254 F. 2d 314 (C.A.D.C. 1954), said:

> "It may be said that the ruling we have just outlined creates a right to interlocutory relief . . ." 254 F. 2d 323.

(b) Commenting on the ruling referred to in (a), Mr. Chief Justice Warren said in *Communist Party of the*

[2] Emphasis added throughout, unless otherwise noted.

United States v. *Subversive Activities Control Board*, 367 U.S. 1 (1961):

> ". . . but it also establishes a cumbersome procedure whereby resort to the Court of Appeals was required *every time* the Board excluded evidence . . ." 367 U.S. at 122.

(c) The Solicitor General in his brief to this Court in the *Communist Party* case said:

> "Petitioner's difficulties with Section 14(a) clearly reflects the erroneous belief that this provision is merely a procedural technicality. Instead, it serves the useful *purpose of allowing interlocutory relief* in situations where the administrative agency's time and effort would often be wasted if appeal from the final order were the only remedy. And even if the injured party does not seek interlocutory relief — and Section 14(a) does not seem to compel it — the reviewing Court can consider the motion to adduce separately and expedite the remand to the administrative agency if the agency has erred. Nor is Petitioner correct in stating . . . that the *Consolidated Edison* holding would produce *multiple interlocutory appeals*. Despite the existence of that decision for many years, such multiple appeals have not apparently resulted; probably because administrative agencies generally give parties before them great latitude in adducing evidence." Brief for Respondent, p. 310.

The diverse interpretations and lack of clarity surrounding the statutory language and court rulings on motions to adduce are further illustrated by various arguments of the Solicitor General on this subject. In the *Communist Party* brief, quoted above, the interpretation was that the statutory language provides for the interlocutory relief of a motion to adduce "but *does* **not** *compel* it." This statement was later interpreted by the Solicitor General to point out that "interlocutory" meant at the time ". . . the court had

a final agency order before it."[3] But we are now told that when the court has a final action before it, the statute *does compel* a motion to adduce since ". . . exclusionary rulings *must* be attacked by a motion to adduce . . ." Brief, p. 10.

CONCLUSION

As noted in the Petition, these costly and time-consuming procedural appeals must be continued until some clarification is forthcoming to protect litigants and to assure that waiver of review does not occur. This Court's own rules provide that review is given here to those situations where conflict and confusion exist. Because of the conflict herein noted, and that pointed out in the original petition, it is urged that the petition for a writ of certiorari should be granted.

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[3] *Texaco Inc. v. Federal Trade Commission*, 371 U.S. 822 (1962), Brief for the Respondent in Opposition, p. 10, note 5.

Respectfully submitted,

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